STATE OF MICHIGAN

COURT OF APPEALS

DENIS SIDNEY PRISK, JR.,

Plaintiff-Appellant,

v

ANN MARIE TYLER,

Defendant-Appellee.

UNPUBLISHED
December 15, 2009

No. 291468
Shiawassee Circuit Court
Family Division
LC No. 07-006279-DM

Before: Beckering, P.J., and Cavanagh and M. J. Kelly, JJ.

PER CURIAM.

In this custody dispute, plaintiff Denis Sidney Prisk, Jr. appeals as of right the trial court's order denying his motion to modify an existing custody order. On appeal, we must determine whether the trial court erred when it found that the evidence did not show proper cause or a change in circumstances sufficient to warrant revisiting the custody order currently in place. We conclude that the trial court's finding was not against the great weight of the evidence. For this reason, and because there were no other errors warranting relief, we affirm.

I. Basic Facts and Procedural History

Prisk married defendant Ann Marie Tyler in 1991. They had three children: Justin, Aaron, and Brian. Prisk and Tyler divorced in 2001. In the judgment of divorce, the trial court awarded sole physical custody of the children to Tyler, but the parties had joint legal custody. Tyler remarried in 2004.

In January 2008, Prisk moved to modify the custody order. In his motion, Prisk argued that there were both changes to the circumstances surrounding the children's lives and proper causes warranting a full hearing. Prisk alleged that Tyler's new husband used inappropriate corporal punishment with the children, mistreated animals, forced the children to mistreat animals and forced one son to kill birds and small animals for target practice. Prisk further alleged that Tyler's new husband engaged in a variety of inappropriate contact with the children, including letting them sleep in the same bed with him and kissing them on the lips. He also alleged that the prior custody order was improperly based on the fact that he was an active member of the armed forces and noted that he now lives closer to Tyler and has the ability to see his children more. Prisk alleged that Tyler and her new husband also actively interfered with his ability to exercise parenting time. Specifically, he alleged that Tyler prevented the children from

attending his deployment and homecoming ceremonies, tried to have his parenting time reduced on a pretext, and prevented the children from sending him e-mails. Prisk also found fault with Tyler and her new husband for forcing the boys to read Bible verses as a form of punishment and noted that the boys' grades were falling. For these reasons, he asked the trial court to order a full hearing and award him sole physical and legal custody.

On three separate dates from February to June 2008, a referee held hearings to consider the allegations Prisk raised in his motion and the evidence in support of those allegations. On June 16, 2008, the referee issued a proposed opinion. The referee concluded that the evidence did not support Prisk's motion. The referee found that the evidence did not support the conclusion that Tyler's actions or those of her new husband has or will have a significant effect on the wellbeing of the children. The referee also found that the changes Prisk noted in his motion were all normal life changes that did not warrant revisiting the custody order. For these reasons, the referee recommended that Prisk's motion be dismissed.

Prisk objected to the referee's opinion. Among many objections, Prisk argued that the referee held him to a higher standard than the preponderance standard; Prisk argued that the referee did this when he "discounted evidence" that Prisk argued showed proper cause. In response to Prisk's objections, the trial court held several hearings and considered the evidence presented at the hearings de novo to determine whether Prisk had established grounds for revisiting the custody order. At the close of the last hearing, the trial court evaluated Prisk's allegations in light of the evidence adduced at the hearings and determined that Prisk had not established proper cause or a change in circumstances sufficient to warrant a review of the custody arrangements. The trial court issued an order denying Prisk's motion in March 2009.

This appeal followed.

II. Motion to Modify Custody

A. Standard of Review

This Court must affirm all custody orders and judgments by the trial court unless "the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. The great weight of the evidence standard is deferential: "this Court should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction." *Brausch v Brausch*, 283 Mich App 339, 347; 770 NW2d 77 (2009); see also *Berger v Berger*, 277 Mich App 700, 707; 747 NW2d 336 (2008) (noting that the standard is deferential and recognizes the trial court's superior ability to judge credibility).

B. Establishing Proper Cause

In order to protect children from unwarranted and disruptive changes to their custodial environment, the Legislature required that a party seeking a change in custody first establish proper cause or a change in circumstances that might warrant revisiting a prior custody order. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). Thus, before a trial court may hold a hearing on a change in custody, the moving party must show by a preponderance of the evidence that there is either proper cause or a change in circumstances. *Id.*

at 508. "[P]roper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Id.* at 511. "The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being." *Id.* at 512; see MCL 722.23 (listing the best interests factors). Change of circumstances means that, "since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed." *Id.*

C. The Burden of Proof

We shall first address Prisk's argument that the trial court improperly applied the applicable burden of proof. Prisk contends that the preponderance standard has not been established for domestic relations cases and that, because it has not been definitively established, "it appears that the trial courts are erroneously holding the preponderance standard too high . . . ." Specifically, Prisk argues that the trial court in his case must have misapplied the preponderance standard because the evidence he presented clearly met that standard.

We do not agree that the preponderance of the evidence standard has not been established for domestic relations cases; it is the same standard without regard to the underlying nature of the action. And, although rarely defined as such, it is well-understood under Michigan's jurisprudence that the ubiquitous preponderance of the evidence standard means "more likely than not." See, e.g., *Skinner v Square D Co*, 445 Mich 153, 165; 516 NW2d 475 (1994) (noting that the "more likely than not" standard applies for proof of causation); see also *Merrow v Bofferding*, 458 Mich 617, 633 n 14 (Mallett, C.J.), 638 n 6 (Boyle, J.); 581 NW2d 696 (1998) (discussing the preponderance or "more likely than not" standard that applies to preliminary questions on the admissibility of evidence); *Holloway v General Motors Corp*, 399 Mich 617, 636-637; 250 NW2d 736 (1977) (noting that the preponderance of probability is "more likely than not."); *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004) (equating a preponderance of the evidence with the "more likely than not" threshold); *People v Burton*, 433 Mich 320, 325 n 25 (Boyle, J.); 445 NW2d 133 (1989), overruled by *People v Barrett*, 480 Mich 125; 747 NW2d 797 (2008); M Civ JI 97.37. Thus, the trial court had the obligation to evaluate all the evidence presented by the parties by weighing the evidence and assessing the credibility of the witnesses to find whether it was more likely than not that there was proper cause or a change in circumstances that would warrant revisiting the current custody order. *Vodvarka*, 259 Mich App at 508.

After a review of the record, we do not believe that the trial court misapprehended or misapplied this standard. Indeed, we conclude that Prisk's actual complaint is with the weight the trial court gave to certain evidence and with the trial court's credibility assessments. The substance of Prisk's argument is that the trial court should have accorded greater weight to his expert witnesses and should not have given Tyler's testimony any weight. However, we are not at liberty to disregard the trial court's assessment of the weight and credibility to be afforded a particular witness' testimony; the trial court may find a witness incredible, may give the testimony little or no weight, or may simply find that another witness is more credible. See *Berger*, 277 Mich App at 708. In this case, after reading the trial court's remarks in full and in context, we conclude that the trial court simply gave very little weight to Prisk's evidence of

abuse and misconduct, which does not amount to a misapplication of the preponderance standard. See *Brausch*, 283 Mich App at 347.

D. Proper Cause

In its findings from the bench, the trial court proceeded to comment on the evidence by reference to the best interests factors listed under MCL 722.23. Although the trial court did not specifically address the more serious allegations—that is, whether Tyler's new husband was engaging in inappropriate contact with the children or hurting animals—it is clear from the trial court's statements that he did not consider these allegations to be meritorious. Indeed, the trial court stated that whether the parties were morally fit, which is factor (f) under MCL 722.23, was "a non-issue, as is Factor G, the mental and physical health of the parties." Factor (f) generally addresses "verbal abuse, drinking problems, driving record, physical or sexual abuse and other illegal or offensive behaviors." *Fletcher v Fletcher*, 447 Mich 871, 887 n 6; 526 NW2d 889 (1994). Thus, the trial court implicitly found that there was no immoral or abusive conduct occurring in Tyler's home. And, after reviewing the evidence properly before the trial court, we cannot conclude that this finding was against the great weight of the evidence.

There was no substantive evidence of physical abuse admitted at the hearing. Both Prisk and Tyler's new husband previously used spankings as a disciplinary technique, but testimony established that Tyler's new husband had not spanked the children in years. Further, although Prisk submitted several reports from investigations conducted after he made allegations against Tyler and her husband, the trial court did not admit these summaries into evidence at the hearing and the investigations conclude that there was insufficient evidence to substantiate the allegations. Likewise, Tyler testified that the complaints were untruthful. In addition, neither of Prisk's experts opined that there was physical, mental or emotional abuse in the Tyler home. Although one expert suggested that the children are opposed to being punished by their stepfather and feel bullied, Tyler explained that the children oppose being punished by her new husband because they believe that only their biological parents should have the right to discipline them.

There was also no direct testimony to describing animal abuse in Tyler's home. Prisk did testify that he filed a protective services report after he saw opossums caged outside Tyler's home and noted that one opossum was injured, but this testimony did not establish that Tyler's new husband abuses animals. Tyler explained that her new husband traps opossums frequently, but stated that she has never seen an injured opossum. She also noted that she never witnessed Tyler punching or beating up the family dogs.

The trial court did find that there were "concerns" about the boys' welfare, but it did not credit Prisk's evidence that suggested that the boys were at serious risk of psychological harm. The trial court recognized that Prisk's experts had opined that the boys were under some distress and experienced frustration. However, the trial court found that neither parent individually caused the problems. Rather, the trial court attributed the problems to the parents' inability to communicate and cooperate with regard to the children and even ordered family counseling to help with the problems.

The record amply supports these findings. In fact, when asked if the children were at risk in their current home environment, Dr. Barclay testified that Prisk, Tyler, and Tyler's husband all

contributed to the problem: "I think the current situation—and I'm speaking broadly, I'm not saying this mom, this step-dad and this father—the children's current situation broadly defined is contributing to significant developmental difficulties and psychological problems for the children." Based on the totality of this evidence, we cannot conclude that the trial court's finding that morality was a "non-issue" was against the great weight of the evidence; there was simply no evidence of serious physical or mental abuse. *Brausch*, 283 Mich App at 347.

The trial court also did not place much weight on Prisk's allegation that the boys' grades were suffering as a result of problems at Tyler's home. The trial court found that there appeared to be some problem with Justin's grades, but that both parents were concerned and working to solve the problem and neither was responsible for the fluctuation. It also found that the other boys' grades were not showing signs of problems.

The trial court recognized that the boys clearly had a preference for custody with their father, but determined that this was not enough under the facts of the case to warrant a review of the custody order. Generally, the shifting attitudes and preferences of the children affected by a custody order will not warrant changing a previous custody determination. See *Curylo v Curylo*, 104 Mich App 340, 349; 304 NW2d 575 (1981) (stating that it is within a trial court's discretion to afford little weight to a child's preference). Moreover, the trial court found that both parents love their children and that they are both capable of providing a good home, but again expressed that the real problem appeared to be the parents' inability to work together as a team to facilitate joint legal custody.

Finally, the trial court also apparently discounted Prisk's claims that Tyler and her new husband actively interfered with his parenting. And the record evidence clearly supports a finding that Tyler does not in fact actively interfere with Prisk's parenting. The record shows that Tyler encourages the children to have a relationship with Prisk. She also does not speak negatively about him, purchases gifts for him at holidays, and she and her husband organized a welcome home banner for Prisk when he last returned from deployment. Furthermore, evidence indicated that Tyler has rearranged Prisk's parenting time to facilitate his work schedule and that she occasionally gives Prisk extra parenting time.

Examining the record as a whole and in light of the trial court's assessment of the evidence, we cannot conclude that the trial court's finding that there was no proper cause was against the great weight of the evidence. *Brausch*, 283 Mich App at 347.

E. Change in Circumstances

On appeal, Prisk also claims that the trial court erred by failing to address his claims that there has also been a change in circumstances sufficient to warrant a review of the custody arrangements. The trial court did not specifically evaluate any particular change in circumstances when it made its findings. However, the trial court did clearly state that there were no changes in the circumstances that would warrant revisiting the custody order. Under the facts of this case, the trial court's brief statement was sufficient. See MCR 2.517(A)(2) ("Brief, definite and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.").

The only real changes in the circumstances relating to custody were Tyler's move from Jackson County to Shiawassee, her remarriage, and Prisk's recent move to be closer to the boys. However, the parties' moves did not significantly affect the conditions surrounding the parties' custody. *Vodvarka*, 259 Mich App at 513. Likewise, remarriage is the type of ordinary life event that will not normally warrant revisiting a custody order. *Id.* at 513-514. In order to show that Tyler's remarriage constituted a sufficient change in circumstances to warrant revisiting the custody order, Prisk had to present evidence that the nature of the marriage was such that it has had or might have a significant effect on the wellbeing of the children. But the trial court extensively commented on the wellbeing of the children in their current custodial environment, which included routine interaction with their stepfather, and determined that there were no moral, physical or mental health issues. That is, the trial court did not find that Tyler's remarriage—with the concomitant exposure of the children to Tyler's new husband—was itself the cause of any significant problems. On this record, we cannot conclude that the trial court's finding that there were no changes to the circumstances that would warrant revisiting the custody order was against the great weight of the evidence. *Brausch*, 283 Mich App at 347.

Prisk additionally appears to argue that the trial court should have proceeded to analyze the best interest factors even though it found his proper cause or change of circumstances claims were "insufficient." However, as stated above, the trial court may not consider the best interests factors without first finding that the movant has established proper cause or changed circumstances sufficient to warrant review of the custody arrangements. *Vodvarka,* 259 Mich App at 509. Therefore, once the trial court determined that Prisk had not met his burden, it properly declined to consider the totality of the circumstances under a best interests analysis.

Prisk also argues that the trial court denied him physical custody based on his "military duty, causing a substantial breach of his constitutionally granted parental rights." However, Prisk did not support this argument with citation to the record or legal authority. Consequently, we conclude that he has abandoned this argument. *Flint City Council v Michigan,* 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002).

III. Evidentiary Rulings

Prisk's next argues that the trial court abused its discretion when it limited the testimony by his experts, Dr. Barclay and Dr. Hatcher. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Elezovic v Ford Motor Co,* 472 Mich 408, 419; 697 NW2d 851 (2005). Again, this Court must affirm custody orders on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28.

A trial court has broad power to control the questioning of witnesses. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999). MRE 611(a) provides:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

In this case, a referee previously conducted a hearing that did not include testimony by Prisk's experts. Although the trial court conducted a de novo hearing after Prisk objected to the referee's recommendations, the trial court was hesitant to allow the new testimony. Nevertheless, it allotted 15 minutes for each party to examine Dr. Barclay. The trial court refused Prisk's request for extra time during Dr. Barclay's direct examination, but it subsequently provided Prisk further opportunities for questioning during redirect. Later, when Prisk called Dr. Hatcher to testify, the trial court did not limit the parties' time for questioning. Instead, Prisk conducted a thorough direct and redirect examination of Dr. Hatcher. However, after the trial court questioned Dr. Hatcher independently, Prisk requested time to follow-up. The trial court replied, "I usually ask the last questions, that's why I opened it back up to counsel to see if you had anything further." In light of the trial court's broad power to control the questioning of witnesses and its evenly balanced limitations here, we cannot conclude that the trial court committed a palpable abuse of discretion in its handling of these witnesses. *Persichini*, 238 Mich App at 632.

Next, Prisk argues that the trial court abused its discretion when it excluded further evidence from Dr. Barclay and Dr. Hatcher regarding "hunting with rifles." Because Prisk fails to cite, and this Court was unable to locate, an instance in the record where the trial court excluded such testimony, Prisk's argument is deemed abandoned. *Flint City Council*, 253 Mich App 378, 393 n 2.

Furthermore, Prisk argues that the trial court abused its discretion when it excluded evidence regarding "animal abuse of not only pets, but trapped animals." At the hearing, Prisk elicited the following testimony from Dr. Hatcher:

> *Prisk's Counsel*. Have the children given you any impression of being taught how to care for animals?
>
> *Dr. Hatcher*. The children have learned how to torture animals and how to kill them.

Tyler's trial counsel objected, challenging the relevance of the question and the trial court sustained the objection. On appeal, Prisk fails to identify the basis for Dr. Hatcher's opinion that the children learned to torture animals. As discussed, there was no direct evidence of animal abuse or torture presented at the hearing. Furthermore, Prisk baldly asserts that, if evidence of animal abuse had been admitted, it would have been a relevant indictor of other types of abuse, which were similarly absent from the record at the hearing. But Prisk failed to support this claim with legal or psychological authority. Consequently, it was not palpably and grossly violative of fact and logic for the trial court to decide that Dr. Hatcher's testimony regarding animal treatment was irrelevant to a proper cause determination of the motion. See MRE 401.

Finally, we conclude that the trial court's decision not to specifically interview the children regarding their preferences was not error warranting relief. As already noted, the children's preferences alone are insufficient to justify revisiting a custody order. *Curylo*, 104 Mich App at 349. And, in any event, the trial court indicated that it was aware of the children's personal preferences and chose not to give those preferences much weight. On these facts, we cannot conclude that the trial court abused its discretion when it declined to further interview the children.

There were no errors warranting relief.

Affirmed.

/s/ Jane M. Beckering
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly